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In The

# Supreme Court of the United States

October Term, 1997

STAN DOBROVOLNY, KENT BERNBECK and RICHARD BELLINO,

*Petitioners,*

*vs.*

SCOTT MOORE, SECRETARY OF STATE OF NEBRASKA,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion of the United States Court of Appeals for the Eighth Circuit erroneously held that the inability of its citizens to know the number of signatures they must obtain on initiative petitions in order to qualify to have the proposal thereof placed on the ballot of a general election, pursuant to such rights as reserved to the citizens in their State Constitution, does not chill the First Amendment right of freedom of political speech, to assemble, and to petition their Government?

2. Whether the opinion of the United States Court of Appeals for the Eighth Circuit erroneously held that the inability of its citizens to know the number of signatures they must obtain on initiative petitions in order to qualify to have the proposal thereof on the ballot of a general election, does not deprive citizens of their Fourteenth Amendment rights to procedural due process of law, insofar as it fails to provide them with notice of what the law requires them to do *prior to* the date upon which compliance is mandated?

## PARTIES TO THE PROCEEDING

In accordance with Supreme Court Rule 14.1(b), the parties to the proceeding in the United States Court of Appeals for the Eighth Circuit, whose judgment is sought to be reviewed herein, are as follows:

*Petitioners*:

Stan Dobrovolny, Kent Bernbeck, and Richard Bellino.;

*Respondent*:

Scott Moore, Secretary of State of Nebraska.

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Appendix A — Opinion of the United States Court of Appeals for the Eighth Circuit Filed October 16, 1997 ..... 1a

Appendix B — Memorandum and Order of the United States District Court for the District of Nebraska Filed August 15, 1996 ..... 7a

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit dated October 16, 1997, whose judgment herein is sought to be reviewed, is unreported but is reprinted in the separate Appendix to this Petition, App. A, p. 1a.[1] The opinion of the District Court for the District of Nebraska is unreported but is reprinted in the separate Appendix to this Petition, App. A, p. 00a.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit, was entered on October 16,1997. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an issue of whether Neb. Const. art. III, § 2, violates U.S. Const. amend. I and amend. XIV, § 1.

## STATEMENT OF THE CASE

### A. Nature Of The Case

The case was filed July 3, 1996, seeking declaratory and injunctive relief, challenging the constitutionality of Neb. Const. art. III, § 2.

At issue was whether Petitioners' First Amendment rights to freedom of speech, and their Fourteenth Amendment rights to due process of law, were violated by the Nebraska Constitutional requirement that they, as initiative petition

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1. References to this petition will be referred to as __a; references to the Court of Appeals Appendix will be referred to as A__.

proponents, must file initiative petitions with the Nebraska Secretary of State, no later than four months before the general election for which a vote thereon is desired, bearing valid signatures of at least 10% of the registered voters in Nebraska on that date, regardless of the fact that neither they nor the Secretary of State knew, or could possibly know, the correct number of validly registered voters in Nebraska on or before the last date such filing could be made.

Respondent admits that the exact number of petition signatures needed to place an initiative proposal on the ballot of the 1996 general election, could not have been known before the filing deadline for such initiative petitions, but denies that the lack of such information violated Petitioners' First and Fourteenth Amendment rights, or otherwise rendered the challenged Nebraska Constitutional provision unconstitutional under the United States Constitution.

**B. Course Of Proceedings In The District Court**

The District Court, pursuant to Fed. R. Civ. P. 69(A)(2), consolidated trial on the merits of the case with the hearing on Petitioners' Motion for Preliminary Injunction. A bench trial was held, evidence adduced, and the matter taken under submission.

**C. Disposition In The District Court And The Court Of Appeals**

After the bench trial, the District Court made findings of fact, analyzed legal precedents, and dismissed the action (7a-22a). The Court of Appeals affirmed (1a-6a).

## REASONS FOR GRANTING THE WRIT

### I.

### CERTIORARI SHOULD BE GRANTED WHEN A FEDERAL COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT, AND HAS DECLINED TO RULE UPON A PROPERLY RAISED FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Supreme Court Rule 19(1)(b) provides criteria for the issuance of a writ of certiorari to a federal court of appeals, specifying that:

> Where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court. . . .

Although the aforesaid rule is not exhaustive, it is nevertheless illustrative of issues upon which the writ may be issued, and in this case the reasons as specified are applicable. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). First, as will be seen, the decisions of the lower courts are contrary to prior decisions of this Court. Secondly, the Eighth Circuit Court of Appeals failed to address two very significant constitutional questions which were within the purview of the allegations of the Complaint, and were clearly a part of the case law discussed in the District Court's opinion.

## II.

**INSOFAR AS NEBRASKA'S CONSTITUTION, AS INTERPRETED BY THE NEBRASKA SUPREME COURT, REQUIRES THE PROPONENTS OF INITIATIVE PETITIONS TO FILE PETITIONS CONTAINING TEN PERCENT OF ALL OF THE STATE'S VALID REGISTERED VOTERS WITH THE NEBRASKA SECRETARY OF STATE, NO LATER THAN FOUR MONTHS BEFORE THE GENERAL ELECTION FOR WHICH THEY ARE PROPOSED, BUT FAILS TO INSURE THAT SUCH PROPONENTS ARE ACCURATELY APPRISED OF THE NUMBER OF SIGNATURES ACTUALLY NEEDED *BEFORE* THE FILING MUST BE MADE, IT NEEDLESSLY DEPRIVES PROPONENTS OF THEIR RIGHTS TO FREEDOM OF SPEECH, TO ASSEMBLE, AND TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES, IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS THEIR RIGHT TO DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

The people of Nebraska reserve the right to amend their Constitution by an initiative petition process. In 1988, the people approved a legislative proposal to amend the initiative provisions of the Constitution to require initiative petition proponents to obtain signatures from 10% of the state's registered voters, as of four months before the general election at which the proposal is to be submitted for a vote. Previously, the number of signatures was 10% percent of the electors who voted in the preceding gubernatorial election. After the 1988 amendment there remained a question as to whether that was still the required number.

The Nebraska Supreme Court ruled in *Duggan v. Beerman*, 245 Neb. 907, 912, 515 N.W. 2d 788 (1994), that indeed the number of signatures required was 10% of the registered voters in the state on the date the filing was required to be made.

Before 1988, the number of signatures needed to place an initiative proposal on the ballot in Nebraska was the number of votes cast in the last gubernatorial election. However, in 1988 Nebraskans voted to amend the Nebraska Constitution so that the word "electors" as used previously in Neb. Const. art. III, § 2, was changed to "registered voters." *Duggan v. Beerman*, 245 Neb. 907, 912, 515 N.W. 2d 788 (1994). The effect of the change, as determined by the Nebraska Supreme Court in *Duggan*, was to require at least a greater than fifty percent increase over the previous requirement in the number of valid signatures mandated to appear on an initiative petition for its proposal to qualify for the ballot. *Id.* at 914-915.

However, it is not the increase in the number of signatures required on an initiative petition which prompted this action to be filed; rather, it is the fact the actual number of signatures proponents are required to obtain, before filing their petitions, is not known before the filing deadline.

The importance for a proponent of an initiative petition to know the actual number of signatures which will be required on an initiative petition before the filing actually occurs, was noted by Petitioner Bernbeck in his testimony in several respects: He testified:

> Well, in any petition campaign, you need to have a buffer to take into account the number of signatures that will be invalidated through the verification process.

(T12:8-10). He further testified that knowing the correct number in advance of filing is

> . . . important as a petition planner to be able to look at the entire picture of the state of Nebraska and be able to, in a sense, utilize the resources and assets that we have at our disposal.

(T19:2-5). The District Court's own questioning of Mr. Bernbeck further emphasized the point:

> [By the Court]
>
> Q. My question to you is: If on July 5th the number was less than you had anticipated by a substantial margin, would you want the secretary of state to use that number rather than a higher number that might have been calculated at some earlier point in time?
>
> A. Not to be evasive at all, I want the secretary of state to use an exact number, a real, accurate number. Whether that's higher or lower, it doesn't matter. I would like to see him use an exact number so I can comply with that number.
>
> Q. *So you don't care what the number is, as long as you know what the number is sufficiently in advance so you can plan; is that the point?*
>
> A. *As a petition campaigner, yes, I want a number that I can comply with.*

(T-34:15-25;35:1-3). (Emphasis added).

Petitioner Dobrovolny, also testified about the importance to initiative proponents of knowing the required number of signatures a reasonable time in advance. He gave testimony, as follows:

> Q. How does the required number of signatures that you anticipate that you need to achieve your goal, how does that affect your planning the use of paid circulators?
>
> A. A great deal. When you're a grass roots organization which basically has no major associations, organizations which have ample funding behind them, you have to basically be a few people, if you will; you have to be responsible for the fund-raising and everything that has to do with that type of thing. And a few thousand signatures makes a sizable difference in the amount of money you have to solicit, if you will, to help pay the costs of such a drive.
>
> Q. Those costs would include the costs of the paid circulators?
>
> A. That's correct, the number of petitions you must print, a number of different things?
>
> Q. Would that affect your planning in terms of the number of paid circulators you would need?
>
> A. Absolutely, and did.

(T41:16-25;42:1-8).

Mr. Dobrovolny, under cross-examination, also made it clear the because the Secretary of States registered voter list is apparently in a rather constant state of flux and like a "moving target," thus making it impossible for the initiative petition proponents to know if they have made the grade before filing their petitions. This problem, creates a situation which can be crucial when trying to decide if more work needs to be done to further protect the investment already made in the endeavor, besides creating a tremendous amount of unnecessary frustration. He testified:

> A. . . .
>
> Under the current system, the signature requirement could change. It could change to the point where you would look back at it, if you had — if you looked back at it and say, "Wait a minute. That was enough at the time. But now since the registered voter list has changed so much, it is no longer enough. We've got to go back to that county and add on to those signatures." That would never happen with an exact figure.

(T51:14-28).

From the standpoint of Petitioner Bellino, the issue was largely a financial concern. He viewed the problem of obtaining signatures in terms of the cost per signature. The campaign's expenditures for printing, as well as payments to contract circulators had to be factored into the planning. In his view, the cost was about $2 per signature obtained. Clearly, not knowing accurately how many signatures would be required made it difficult to budget the campaign with limited funds. (T-58:10-25; 59:1-24).

Not only was there a guessing game about what number of signatures was required on initiative petitions in 1996, that number was actually dramatically increased by the Secretary of State's office between his last reporting before the filing date of July 5, 1996, and a few days thereafter. In May of 1996 Defendant-Appellee's office made available to the public an abstract of Nebraska's 1996 Primary Election results which showed 977,342 registered voters (Ex. A ¶ 4). However, after the last date for filing initiative petitions, Respondent's periodic survey of registered voters of July 8, 1996, showed a dramatic increased to 989,383 registered voters (*Id.*). An increase of 12,042 registered voters! That jump in numbers caused Petitioner Bellino to be "totally surprised." (T-58:6-9). Even more dramatic is the fact that as of July 1995, one year before the deadline date for filing the initiative petitions at issue, and a time when at least one of the petition drives was making plans for its campaign, (T-38:18-21), the number of registered voters reported by Respondent was 944,135; a 45,248 increase!

Although the increase in the registered voter numbers might not appear dramatic in an absolute sense, if they are considered in light of the initiative petition process they can have a very real impact. As noted in the findings of the District Court, in 1992 an initiative petition campaign proposed adoption of the Clean Environment Act, and sought placement on the November 1992 general election ballot. Proponents of that initiative petition timely filed petitions on which the Secretary of State ultimately determined there were 40,803 valid signatures. However, 41,058 were needed. The proposal was denied a place on the ballot because it was short just 255 signatures (A39-A40).

**A. The Nebraska Constitution Poses A Risk Of Diminishing The Exercise Of Fundamental First Amendment Rights Of Free Speech.**

The Nebraska District Court and Eighth Circuit Court of Appeals gave no weight to Petitioners' First Amendment claims, and chose to distinguish this case from *Meyer v. Grant*, 486 U.S. 414 (1988), which holds that circulation of initiative petitions involves core political speech warranting strict scrutiny analysis under the First Amendment.

Petitioners, however, respectfully disagree with the District Court's and the Eighth Circuit's conclusions. If circulating initiative petitions involves "core speech" as noted by the United States Supreme Court in *Meyer*, then any governmental action impairing the full and unfettered exercise of the right should be subjected to strict scrutiny analysis, regardless of whether it involves a legislatively, judicially, or even people imposed restriction, restraint, or impairment. Surely any governmental action which causes a party to hesitate to exercise the rights of free speech, assembly, or petitioning for redress of grievances, should be viewed as chilling those rights. And, if a party cannot know before exercising such rights what is expected of them, and are left to guess, speculate, and conjecture about what is required will they not think twice or even thrice about planning and pursuing a venture to inform and persuade the public of the rightness of their cause?

In Nebraska, initiative petition proponents do not know what is expected of them until after they must act. They are told they must file petitions containing the signatures of ten percent of the validly registered voters in Nebraska by a certain date, but if they ask what that number is, they are told nobody knows, even though the result of a miss by an inch is the same as a miss by a mile.

U.S. Const. amend. I provides that Congress

> shall make no law . . . abridging the freedom of speech, or of the press; or the right of people to peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1, makes that mandate applicable to the State of Nebraska. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Meyer v. Grant*, 486 U.S. 414, 418 (1988).

Despite the lower courts' views that this case does not involve a restriction or limitation on core political speech, and its conclusion that the decision in *Meyer* was not applicable to the facts of this case, it should be noted that the opinion in *Meyer*, after noting that once a state grants the initiative petition right to its citizens, it must do so in full compliance with the United States Constitution, *Id.*, specifically commented on the fact that the initiative process entails an important right of expression. The Court stated:

> *The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.* Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. *Thus, the circulation of a petition involves the type of interactive communication concerning political*

> *change that is appropriately described as "core political speech."*

*Id.* at 421. (Emphasis added). *See also Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

It is true, as noted by the District Court, that *Meyer* involved a question of whether a prohibition on the use of "paid circulators" for initiative petitions infringed First Amendment rights, while this case involves a question of whether not knowing the number of signatures required on an initiative petition before it must be filed infringes on First Amendment rights. In the lower courts' view the fact that the number of signatures required on an initiative petition is not known before the filing must be made

> may well make it difficult for the sponsors to plan their campaign and efficiently allocate their resources . . . it does not limit the means the initiative sponsors may use in communicating their message or in any way limit the content of their message.

(A44).

The lower courts, however, are incorrect in concluding that the fact of "not knowing" the exact requirement for signatures, before the filing must be made, has absolutely no impact on the process of communicating the message of the initiative petition. After all, it is quite easily inferred that if, as an initiative petition proponent, you know reasonably well in advance of the time you must file that you need 98,938 valid signatures rather than 97,342, or 94,413, (A38), you will probably enhance your efforts to contact more people. Thus, by mere force of logic you will thereby communicate your message to a greater number of people.

Of course, knowing the number of signatures required, reasonably well in advance of the final filing date, could also mean that fewer people would need to be contacted than had been anticipated when the petition campaign began. As a result, you may reduce the number of people contacts you will make, for budgetary considerations, thereby communicating the message to fewer people. Nevertheless, if the right to free speech under the First Amendment is involved, and the established process keeps initiative proponents "in the dark" about what they are required to do before they must do it, should the courts decline to strike down the process when, in some circumstances, it will clearly inhibit expanded communication of the message, just because other circumstances could occur which would not result in such expanded communication?

Accordingly, while the lack of foreknowledge by petition proponents of the exact signature requirement may not totally frustrate the communication process, it can in certain very predictable circumstances impair or lessen the amount of communication which occurs.

Petitioners, of course, recognize that even if Nebraska's system of determining the signature requirement was changed to insure a definite number will be made known well in advance of the filing date, it would not necessarily follow that First Amendment rights would be enhanced. For example, if the requirement was worded so that initiative proponents are required to obtain signatures equaling or exceeding 10% of the number of registered voters in Nebraska during the last gubernatorial election, whether they voted or not, the number as of the required filing date would clearly always be known ahead of time. However, knowing that number in advance would only insure that petition proponents would try to budget and target that number, plus a reasonable buffer of additional signatures, and that would not perforce result in greater communication of their message.

That, however, is not the point of being rid of the First Amendment impairment inherent in the existing system. Regardless of whether a more definite system in the future would enhance message communication, the present system contains a flaw which poses a very real risk of diminished communication in the future, if it is left in place. That this can occur is proven by the fact that between May of 1996 and July 8, 1996, a date three days after the filing deadline, the number of registered voters being reported by the Secretary of State had increased by over 12,000 voters.

It is the real risk that communication *can be* diminished by Nebraska's current system which should bring into play strict scrutiny analysis in this case. Generally, strict scrutiny review is the most stringent form of judicial review. Under strict scrutiny review, the Court requires the state to justify its actions by showing that it has a "compelling interest" and that the means the state chooses to realize its interest infringes as little as possible on the exercise of individual rights. The Supreme Court has consistently applied strict scrutiny analysis to ballot access restrictions. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Norman v. Reed*, 502 U.S. 279 (1992); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173 (1979); *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Parish*, 415 U.S. 709 (1974).

It is noteworthy that the Supreme Court in *Meyer* considered the initiative process to be not only important core political speech, it commented, as follows:

> We agree with the Court of Appeals' conclusion that the statute trenches upon an area in which the importance of First Amendment protections is "at its zenith." For that reason the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.

486 U.S. at 425.

While the provision at issue herein does not criminalize the exercise of a First Amendment right, as did the statute in *Meyer*, this case nonetheless involves an area in which a First Amendment right is indeed at "its zenith," and the District Court erred in not considering the continuing risk of an adverse impact on the exercise of free speech which Nebraska's "by guess and by golly" system of informing petition proponents of pre-filing signature requirements now sanctions.

Furthermore, Neb. Const. art. III, § 2, compromises the First Amendment in an oblique but nonetheless invidious manner, by discouraging people from even becoming involved in an initiative petition campaign when they are told at the outset that the ultimate standard of qualification, to even have the right to compete, will not be known until after the attempt to qualify is made. An analogy may help to illustrate this point.

**POLE VAULT ANALOGY**

Assume a group of athletes are told there are wonderful trophies to be won if they can first qualify for entry in a certain contest. After qualifying they will then have to not only compete, but also win a majority of the public's approval of their particular performance in a public arena, before they can earn one of the wonderful trophies.

They are then told that the entry fee in terms of dollars is extremely high, and that a tremendous amount of preparation and very hard work is necessary just to have the right to qualify. They are told that the qualifying event is the same for all who enter, and are not already daunted by the task. That qualifying event is a pole vault. However, it is not just an ordinary pole vault. In this pole vault event they are told they will first be blindfolded, and that although they will be pointed in the general direction of the bar they must vault, they will not be told exactly

how high the bar is above the ground. They are also told that as they approach the bar, it will be moving either up or down, and nobody knows for sure exactly how high it will be when they reach it. Finally, they are again reminded that even if under those circumstances they manage to clear the bar, their success at that point will only give them a chance to later try to win a majority of the public's approval for the ultimate performance of their chosen event.

> **NOTE:** The reason the bar in the analogy is described as moving is because the number of registered voters in Nebraska is in a constant state of flux. Not only are new people presumably registering to vote almost daily, the Court can surely take judicial notice of the fact that on a daily basis people who have previously registered to vote are becoming ineligible to be on the list because they have either died, moved out of state, or become felons. Of course, Nebraska statutes require a purging of names from the registered voter list in such cases. Neb. Rev. Stat. § 32-326 (1994 Supp.).

For initiative proponents the effect of Neb. Const. art. III, § 2, is somewhat reminiscent of an old Johnny Cash tune: "How high's the water Mama? Its six feet high and risen!" They know things may be bad, they just don't know how bad!

**B. Nebraska's Constitution Unnecessarily, And Without Good Reason, Discourages Free Speech Under The First Amendment.**

The lower courts both found Petitioners' inability

> to know the precise number of signatures they need in order to have their initiative measures placed on

> the ballot does not in any way restrict or inhibit their ability to circulate petitions or engage in core political speech.

At most, in the lower courts' opinions, the Nebraska process might make it more "difficult for the sponsors to plan their campaign and efficiently allocate their resources. . . .". However, if Nebraska in making the process unnecessarily difficult and unpredictable has also created a real potential to discourage people from even becoming involved in the initiative petition process, is not a free society's goal of obtaining a free flow of ideas, (good, bad, and otherwise), seriously jeopardized?

Surely a process sanctioned by the people to allow citizens the right to initiate measures for amendment of their state's constitution, as the Supreme Court held in *Meyer*, "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421.

As such, the entire initiative process, not just the question of who can circulate petitions, is protected by the First Amendment and subject to strict scrutiny analysis, contrary to the lower court's finding in this case, as well as that in the case of *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996), upon which the District Court relied.

Frankly, even if all the challenged provision did was to make it more difficult for initiative proponents "to plan" or "allocate resources" in the preparation for, or furtherance of, a petition campaign, as the District Court ruled, the extra difficulty created, when measured under strict scrutiny analysis, should represent a state interest "sufficiently weighty" to justify its existence. *Norman v. Reed*, 502 U.S. 279, 288-289 (1991). *Norman* is also noteworthy insofar as it held that a decision by the Illinois Supreme Court, upholding the validity of a restrictive political

provision in the Illinois Constitution, was subject to being further reviewed by the United States Supreme Court under provisions of the United States Constitution, and thereupon reversed and modified. So also should the ramifications of the Nebraska Supreme Court in *Duggan v. Beerman*, 245 Neb. 907, 515 N.W. 2d 788 (1994), be subject to further consideration in federal court under provisions of the United States Constitution.

The problem with the provision challenged in this case is not that it creates a higher signature requirement than had previously prevailed for initiative petitions, but that it could have created the higher signature requirement in a manner which would not keep petition proponents "in the dark" as to what is expected of them until after the deadline is already past. The "higher number" requirement could be accomplished along with an established "known number" requirement if either Nebraska's Constitution, or legislation passed pursuant thereto, simply provided that petition proponents must obtain signatures from 10% of the valid registered voters, as determined on January 1 of the year in which the petitions will be tendered for the ballot, or on any other day certain which precedes the filing deadline by a reasonable amount of time.

**C. Nebraska's Constitution Infringes On The Freedom To Assemble.**

Although Plaintiff Appellants have focused primarily on free speech issues under the First Amendment, it is also suggested that Neb. Const. art. III, § 2, violates the right of freedom to assemble guaranteed by the First Amendment, for many of the same reasons it violates the right of free speech. In this regard, if persons can be discouraged from even undertaking an initiative petition campaign, as previously noted, it logically follows they will also be inhibited in their ability to call meetings or form groups, organizations, and coalitions for such purposes.

Certainly, there is a First Amendment right to associate with others for the advancement of beliefs, ideas, and opinions, to communicate, and generally to engage in all protected First Amendment activities. In *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), the Supreme Court stated:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

In *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), the Court noted: "The First Amendment protects political association as well as political expression."

Any state action which impinges upon such right of assembly and association should be subject to strict scrutiny and voided, unless there is a very compelling state interest in preserving such an impingement. *Eu v. San Francisco County Democratic Cent. Committee*, 490 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

**D. Nebraska's Constitution Significantly Impairs The Right Of The People To Petition The Government For Redress Of Grievances.**

Petitioners recognize that thus far it appears the United States Supreme Court has not directly spoken to the issue of whether the initiative petition process, recognized in some states, is necessarily protected by that part of U.S. Const. amend. I, which protects the right of the people "to petition their Government for a redress of grievances."

However, there is certainly reason to conclude that once such a right is recognized by a state, it become protected by the aforesaid provision. *See McDonald v. Smith*, 472 U.S. 479, 481 (1985), wherein it was noted that James Madison had during a congressional debate on the Petition Clause made it clear the people had the right to communicate their will or grievances through direct petitions to the legislature and government officials. *See also Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217 (1967); *Thomas v. Collins*, 323 U.S. 516 (1945); *United States v. Cruikshank*, 92 U.S. 542 (1876).

Petitioners also recognize that the United States Court of Appeals for the Eleventh Circuit rejected the idea that the Petition Clause of the First Amendment is applicable to the initiative petition process. In *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996), a case relied on by the lower courts in this action, it was noted that

> . . . in the initiative petition process people do not seek to make wishes known to government representatives but instead to enact change by bypassing their representatives altogether.

Accordingly, based on the apparent reasoning that the Petition Clause of the First Amendment only applies to petitions to governmental representatives, the court in *Biddulph* concluded the Clause was not applicable initiative petitions.

However, despite the review of precedents in the *Biddulph* case, it is suggested that the opinion applies a much too narrow interpretation to the meaning of the word "government" as used in the Petition Clause of the First Amendment. No less an authority on our government than Abraham Lincoln once noted that ours is ". . . a government of the people, by the people, and for the people. . . ." Lincoln, *Address at Dedication of National Cemetery at Gettysburg, Pennsylvania* (1863).

If, based upon most historical and philosophical precedents, our government is "the people," and not merely public officials, it should logically follow that any citizen should have a right under the First Amendment Petition Clause to use the initiative process, in states where it is recognized, to petition all other fellow citizens who thus far in this nation have been recognized as constituting our government. If a citizen of a state, which recognizes the initiative petition process, feels aggrieved by the will of the majority, expressed in the State's Constitution, he or she is guaranteed the right under the First Amendment to petition the rest of the people, who constitute "the government," for a redress of his or her grievances. Surely the First Amendment language should, unless there is a compelling reason otherwise, be applied in accordance with its clear language, and interpreted to plainly mean what it plainly says. Justice Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960).

**E. Nebraska's Constitution Deprives People Of Both Procedural And Substantive Due Process Of Law In Violation Of The Fourteenth Amendment.**

Whenever a state law, regulation, or provision is challenged as violative of the First Amendment, U.S. Const. amend. I, an analysis of the question necessarily involves the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, since the term "liberty" in the latter provision makes the First Amendment applicable to the states. *Whitney v. California*, 274 U.S. 357, 373 (1927); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 779-780 (1978). *See also* Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13, 20, 25-26 (1992).

However, in this case it is suggested that the Fourteenth Amendment is implicated even more directly because, not only does Neb. Const. art. III, § 2, as interpreted in *Duggan v. Beerman*, 245 Neb. 907, 912, 515 N.W. 2d 788 (1994), and as

applied by the Respondent, violate the First Amendment as heretofore noted, it also violates the Fourteenth Amendment due process clause. It does so insofar as it fails not only to mandate reasonable time prior notice, it fails to mandate that any *prior notice* be given to initiative petition proponents of the precise minimum number of valid registered voter signatures they must file, *before* they must file. They are thereby compelled by the provision to run the risk of losing the benefit of the expenditures of money and time they invested in an initiative petition campaign, without knowing reasonably in advance of the deadline whether they could or should have done more. Their money and effort is needlessly required to be placed at risk, for no compelling governmental reason whatsoever.

Thus Petitioners herein were deprived of procedural due process of law, because of a lack of prior notice. They were also deprived of substantive due process of law not only from a personal liberty standpoint under the First Amendment, but also from an economic standpoint because they had made an investment of money, time, and effort in a cause in which they believed, but were unnecessarily denied an opportunity to do more to protect that investment, because the government did not, and, in light of the challenged provision, probably could not supply them with factual information required to make an informed judgment about whether they should spend more, or work harder, to protect their investment.

Of course, this Brief has already touched upon the manner in which First Amendment "personal liberties" are involved in this case and how those liberties were infringed by the lack of "prior notice," under the challenged provision. To the extent procedural and substantive due process issues apply to the economic question, Petitioners rely primarily on drawing an analogy to the case of *Goldberg v. Kelly*, 397 U.S. 254 (1970). In that case the Supreme Court held that procedural due process

requires that welfare recipients must be provided with adequate notice and an evidentiary hearing before benefits may be discontinued. *Id.* at 260-268. In *Goldberg*, the plaintiffs alleged that certain New York State and New York City officials, who administered federal and state welfare programs, had terminated or were about to terminate assistance without prior notice and a hearing. *Id.* at 255-256. The Court held that if an individual qualifies under the statute as a welfare recipient, he or she is entitled to the benefit, because it qualifies as a "property" interest which may not be terminated without prior notice and an appropriate hearing. *See also Bell v. Burson*, 402 U.S. 535 (1971), holding that a driver's license is a "property" interest calling for due process protections.

While drawing an analogy to the foregoing cases is by no means a perfect fit, those case do set a backdrop against which this case can be juxtaposed. Considering the fact that the Petitioners have invested time, money, and effort into their respective initiative petition campaigns, it is reasonable to conclude they have a property interest in those campaigns. It is also fair to assume they have a right to protect that property interest, and that the state should not needlessly cause harm to that interest or make it unnecessarily difficult for them to protect that interest. Accordingly, if the state were to propose that it could prevent citizens from even filing their initiative petitions, after and despite their prior investments therein, under the *Goldberg* and *Bell*, the state could not do so without at least providing prior notice and an opportunity to be heard before such action could be taken.

Of course, the state in this case did not attempt to prevent Petitioners from even filing the petitions. The state did, however, impair Petitioners' ability to protect their property interest by imposing a Constitutional provision making it impossible for them to know reasonably in advance of the final day they can

still protect that investment, whether they need to do so or not. Because they are given no *prior notice* of the standard they must meet, they simply cannot protect themselves or otherwise make an informed decision as to whether they need to do so, or not! Unfortunately, that problem could not, and cannot, be solved by any hearing before the deadline, because even if a hearing were held, Respondent would still be unable to give a precise answer before the filing deadline.

Nonetheless, even though a hearing in this case would not remedy the denial of due process arising from the lack of prior notice, the fact due process is denied by Nebraska's "in the dark" initiative petition procedure, cannot be denied.

In *Goldberg* and *Bell* prior notice and a hearing were necessary to remedy the due process problems therein presented. Here, all that is needed is reasonable prior notice of the criteria which must be met, before the parties are put at risk.

## CONCLUSION

Wherefore, Petitioners pray that a writ of certiorari be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED OCTOBER 16, 1997

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96-3683

Stan Dobrovolny; Kent Bernbeck; Richard Bellino,

Appellants,

v.

Scott A. Moore, individually and officially, Secretary of State for the State of Nebraska,

Appellee.

Appeal from the United States District Court for the District of Nebraska.

Submitted: May 20, 1997
Filed: October 16, 1997

Before McMILLLAN, ROSS and FAGG, Circuit Judges.

ROSS, Circuit Judge.

Stan Dobrovolny, Kent Bernbeck and Richard Bellino, initiative petition organizers (appellants), appeal from the district court's[1] conclusion that article III, § 2 of the Nebraska

1. The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska

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Constitution, as interpreted by the Nebraska Supreme Court in *Duggan v. Beermann*, 515 N.W.2d 788, 793-94 (Neb. 1994), does not violate their right to freedom of speech or procedural due process as guaranteed by the First and Fourteenth Amendments. We affirm.

I.

Article II, §§ 1, 2 and 4 of the Nebraska Constitution, allow the people of Nebraska to amend their state constitution through the initiative petition process. Under article III, § 2, as interpreted in *Duggan*, the number of petition signatures necessary to place an initiative measure on the ballot is equal to 10% of the number of registered voters in Nebraska on the date that initiative petitions must be submitted to the Nebraska secretary of state. 515 N.W.2d at 793-94. As a result, initiative proponents cannot know the exact number of signatures necessary to place their measures on the ballot until they submit their petitions to the secretary of state for review. Appellants brought this § 1983 action, alleging that article III, § 2 violates their First Amendment right to free speech, as well as their right to due process of law under the Fourteenth Amendment, because they have insufficient prior notice of the number of signatures required for any given initiative petition.

II.

Appellants rely primarily on *Meyer v. Grant*, 486 U.S. 414 (1988), to support their contention that the established procedure for calculating the required number of signatures violates their First Amendment right to free speech. In *Meyer*, the Supreme Court held that a Colorado statute, which made it a felony to pay circulators of initiative petitions, violated the First

Amendment. In its First Amendment analysis, the Court applied "exacting scrutiny" because the statute restricted "the type of interactive communication concerning political change that is appropriately described as 'core political speech.' " *Id.* at 420-22.

We agree with the district court's conclusion that the appellants' inability to know in advance the exact number of signatures required in order to place their initiative measures on the ballot in no way restricted their ability to circulate petitions or otherwise engage in political speech, and therefore the decision in *Meyer* is inapplicable. In contrast to the Colorado statute which limited the number of voices available to convey a particular political message, as well as the size of the audience that could be reached, the constitutional provision at issue here does not in any way impact the communication of appellants' political message or otherwise restrict the circulation of their initiative petitions or their ability to communicate with voters about their proposals. Nor does the provision regulate the content of appellants' political speech. While the Nebraska provision may have made it difficult for appellants to plan their initiative campaign and efficiently allocate their resources, the difficulty of the process alone is insufficient to implicate the First Amendment, as long as the communication of ideas associated with the circulation of petitions is not affected. As the Eleventh Circuit noted in *Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1086 (1997), "*Meyer* does not require us to subject a state's initiative process to strict scrutiny in order to ensure that the process be the most efficient or affordable. Absent some showing that the initiative process substantially restricts political discussion . . . *Meyer* is inapplicable."

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Because article III, § 2, as interpreted by the Nebraska Supreme Court in *Duggan*, does not involve restrictions on the circulation of petitions nor the communication of speech, political or otherwise, we affirm the district court's conclusion that the provision does not violate the First Amendment.

III.

The appellants also argue that article III, § 2 violates their right to procedural due process because the appellants and other initiative proponents are without notice of the precise minimum number of valid registered voter signatures required to place an initiative on the ballot prior to the time they file their petitions with the State. Hence, appellants contend their expenditures of time and money is placed at risk for no compelling governmental reason.

The possession of a protected life, liberty or property interest is a condition precedent to the government's obligation to provide due process of law, and where no such interest exists, there can be no due process violation. *Movers Warehouse Inc. v. City of Little Canada*, 71 F.3d 716, 718 (8th Cir. 1995). The appellants contend that they have a property interest at stake in their initiative campaigns because of their investments of time, money and effort in the initiative process. They also assert that they have some kind of liberty interest that is affected by the fact that they cannot know the exact number of signatures necessary to place an initiative on the ballot during an initiative campaign. Those asserted interests purportedly give them a right to procedural due process. We disagree.

Clearly, the right to a state initiative process is not a right guaranteed by the United States Constitution, but is a right

created by state law. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). Moreover, the procedures involved in the initiative process, including the calculation of the number of signatures required to place an initiative measure on the ballot, are state created and defined. Therefore, if any right to the initiative process or specifically to prior notice exists, it is dependent upon a finding that state law has created in appellants an interest substantial enough to rise to the level of a "legitimate claim of entitlement" protected by the Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Montero v. Meyer*, 13 F.3d 1444, 1447 (10th Cir.), *cert. denied*, 513 U.S. 888 (1994). The state "retains the authority to interpret [the] scope and availability" of any state conferred right or interest. *Biddulph*, 89 F.3d at 1500 (quoting *Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984)). "[A] liberty interest created by state law is by definition circumscribed by the law creating it." *Montero*, 13 F.3d at 1450.

Clearly, appellants can claim no constitutionally-protected right to place issues before the Nebraska electorate; any opportunity to do so must be subject to compliance with state constitutional requirements. *See id.* at 1446-47. Nor do appellants have a state right to prior notice of the exact number of signatures required to place an initiative measure on the ballot. Having no such right under state law, the appellants have no right or interest which would entitle them to due process protection.

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IV.

Based on the foregoing, the judgment of the district court is affirmed.[2]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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2. Appellants also argue that article III, § 2 of the Nebraska Constitution violates their constitutional rights to assembly, to petition the government for redress of grievances and to substantive due process. Because these claims were not properly raised before the district court, we decline to consider them for the first time on appeal. *See Renfro v. Swift Eckrich, Inc.*, 53 F.3d 1460, 1464 (8th Cir. 1995) (reusing to consider issues raised for the first time on appeal unless exceptional circumstances exist).

## APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA FILED AUGUST 15, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:CV96-3262

STAN DOBROVOLNY, KENT BERNBECK and RICHARD BELLINO,

Plaintiffs,

vs.

SCOTT MOORE, Secretary of State for the State of Nebraska, Individually and Officially,

Defendant.

### MEMORANDUM AND ORDER

The plaintiffs filed this action on July 3, 1996 seeking declaratory and injunctive relief challenging the constitutionality of the Nebraska Constitution, Article III, Section 2 as interpreted by the Nebraska Supreme Court in *Duggan v. Beermann,* 245 Neb. 907, 515 N.W. 2d 788 (1994). (Filing 1 ¶ 1.) At issue is whether determining the number of signatures required to place an initiative measure on the general election ballot on the date the signatures are due based on the number of registered voters on that date violates the petitioners First Amendment or Due Process rights under the United States Constitution.

Contemporaneous with the filing of their complaint, the

plaintiffs moved for a preliminary injunction (filing 2), and pursuant to Federal Rule of Civil Procedure 65(a)(2) I ordered that trial on the merits of this action be consolidated with the hearing on Plaintiffs' Motion for Preliminary Injunction. (Filing 7.)

After a bench trial on the merits of Plaintiffs' complaint, I now set forth the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).[1]

I.

I find the material facts to be these:

1. Plaintiffs are Nebraska residents who are supporters and organizers of various initiative petition drives. (Filing 1 ¶¶ 2-4, 6-8.)

a. Plaintiff Kent Bernbeck is co-chair of the Nebraska Term Limits Committee, an organization devoted to the circulation of an initiative petition and passage of a constitutional amendment that would limit the terms of elected officials. (*Id.* ¶ 6.)

b. Plaintiff Stan Dobrovolny is president of Nebraskans for Equal Taxation, an organization devoted to the circulation of an initiative petition and passage of a constitutional amendment regarding property taxes. (*Id.* ¶ 7.)

c. Plaintiff Richard Bellino is a sponsor of the Initiative

1. Any finding of fact that is more properly construed as a conclusion of law shall be so construed. Likewise, any conclusion of law that is more properly construed as a finding of fact shall be so construed.

to Preserve Nebraska Assets and Live Horse Racing which proposes an amendment to the Nebraska Constitution which would legalize gambling. (*Id.* ¶ 8.)

2. The initiative petition organizations referenced in the plaintiffs' complaint have all presented petitions with signatures to the office of the Nebraska Secretary of State in an attempt to place their various initiative proposals on the November 1996 general election ballot in Nebraska. (Exhibit A, Stipulation of fact ¶ 6.)

3. Defendant Scott Moore is a resident of Lincoln, Lancaster County, Nebraska, and is the duly elected and currently serving Secretary of State of the State of Nebraska. (*Id.* ¶ 1.)

4. Under the provisions of Neb. Rev. Stat. § 32-201 (Michie 1995), defendant Scott Moore has authority to decide disputed points of Nebraska election law. (Exhibit A, Stipulation of fact ¶ 3.)

5. Under the provisions of Neb. Rev. Stat. § 32-202 (Michie 1995), defendant Scott Moore has authority to supervise the conduct of primary and general elections in this state, and to develop and print manuals and pamphlets dealing with the initiative and referendum process in Nebraska and the nature of individual initiative and referendum measures. (Exhibit A, Stipulation of fact ¶ 2.)

The Nebraska Initiative Process

6. The State of Nebraska allows its citizens to amend the state constitution through the initiative process. Neb. Const. art. III, §§ 1, 2, 4.

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7. The right to the initiative petition process in Nebraska is created by Article III of the Nebraska Constitution, and the pertinent provisions are as follows:

> . . . The people reserve for themselves, however, the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature.

Neb. Const., art. III, § 1.

> The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the proposed measure shall be set forth at length. If the petition be for the enactment of a law, it shall be signed by seven percent of the registered voters of the state, and if the petition be for the amendment of the Constitution, the petition therefor shall be signed by ten percent of such registered voters. In all cases the registered voters signing such petition shall be so distributed as to include five percent of the registered voters of each of two-fifths of the counties of the state, and when thus signed, the petition shall be filed with the Secretary of State who shall submit the measure thus proposed to the electors of the state at the first general election held not less than four months after such petition shall have been filed.

Neb. Const., art. III, § 2.

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* * *

> The whole number of votes cast for Governor at the general election next preceding in filing of an initiative or referendum petition shall be the basis on which the number of signatures to such petition shall be computed.

Neb. Const., art. III, § 4.

8. In *Duggan v. Beermann,* 245 Neb. 907, 515 N.W.2d 788 (1994) the Nebraska Supreme Court held that the number of signatures required by the Nebraska constitution for placement of an initiative measure on the general election ballot is equal to 10 percent of the number of registered voters in Nebraska measured on the date the signatures are turned in to the Secretary of State for certification.

Registered Voters

9. Each county in Nebraska keeps an up to date public record of the number of registered voters in that county. That information is not available over the telephone, but any member of the public, including the plaintiffs, may review the list of registered voters in person. (Tr. 35:3-25; 66:19-67:16.)

10. In conformance with his duties under Neb. Rev. Stat. § 32-202(9) (Michie 1995) to prepare and transmit reports as required by the National Voting Rights Act of 1993, 42 U.S.C. §§ 1973 *et seq.*, defendant Scott Moore, or staff members in his office under his supervision, compiles listings of the total number of registered voters in the State of Nebraska on a periodic basis. In addition, defendant Scott Moore, or staff members in his office

under his supervision, prepare such listings in connection with the canvass books and abstracts for the primary and general elections held in the State of Nebraska. (Exhibit A, Stipulation of fact ¶ 3.)

11. The periodic listings of the total number of registered voters in the State of Nebraska and the canvass books and abstracts of the primary and general elections held in the State of Nebraska are matters of public record which are available to all members of the public including the plaintiffs in this action. (*Id.* ¶ 3.)

12. From the period of time from the November 1994 general election through the present, defendant Scott Moore, or staff members, in his office under the supervision of the Secretary of State, prepared listings of the total number of registered voters in the State of Nebraska on five occasions. All the information in each listing was available to the public, including the plaintiffs in this action. The nature of each listing, the total number of registered voters in Nebraska at that time, and the date that the information became available to the public for each of those five occasions are as follows:

a. Canvass Book, 1994 General Election — 919,321 registered voters — available to the public, December, 1994

b. Periodic survey of registered voters — 944,135 registered voters — available to the public, July, 1995.

c. Periodic survey of registered voters — 962,869 registered voters — available to the public, January, 1996.

d. Abstract of 1996 Primary Election results — 977,342 registered voters — available to the public, May, 1996.

e. Periodic survey of registered voters — 989,383 registered voters — available to the public, July 8, 1996.

(*Id.* ¶ 4.)

13. Defendant Scott Moore caused press releases to be issued by his office stating the number of registered voters in Nebraska on May 9, 1996, and on June 12, 1996. True and correct copies of those press releases are in the record. Apart from these two releases, defendant Scott Moore can produce no additional press releases concerning the number of registered voters in Nebraska issued during the time period from January, 1995, through July, 1996. (*Id.*)

14. Subsequent to the periodic survey of registered voters completed in July 1996, defendant Scott Moore announced to the public that 98,938 signatures would be needed to place initiative measures on the ballot for the Nebraska statewide general election to be held in November, 1996. He made that announcement on July 8, 1996. (*Id.* ¶ 5.)

15. Based upon the receipts issued by the staff in the office of the Nebraska Secretary of State, acting under the supervision of defendant Scott Moore, to representatives of each of those petition organizations, those organizations purported to present initiative petitions to the Office of the Secretary of State containing the following numbers of signatures:

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a. Nebraska Term Limits Committee —159,334 signatures

b. Nebraskans for Equal Taxation —107,670 signatures

c. Initiative to Preserve Nebraska — 133,100 signatures
Assets and Live Horse Racing

(*Id.* ¶ 6.)

16. Pursuant to the provisions of Neb. Rev. Stat. ¶ 32-1409 (Michie 1995), defendant Scott Moore is currently in the process of determining the validity and sufficiency of the signatures submitted in connection with each of those initiative petition measures so as to decide whether the constitutional and statutory requirements have been met to place those measures on the November general election ballot. (Exhibit A, Stipulation of fact ¶ 6.)

17. Based upon the Canvass Book prepared by the Nebraska State Board of Canvassers, 586,542 persons voted for Governor at the general election held in November, 1990. (*Id.* ¶ 7.)

18. Based upon the Canvass Book prepared by the Nebraska State Board of Canvassers, 579,561 persons voted for Governor at the general election held in November, 1994. (*Id.*)

19. In 1992, various individuals and entities sponsored an initiative effort to place the Clean Environment Act on the November, 1992, Nebraska general election ballot. The initiative effort proposed a statute which would use the proceeds of certain taxes on cigarettes to establish a program to maintain and restore pure water, air, and land in Nebraska through various means.

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The clean Environment Act initiative sponsors presented their initiative petitions to Allen J. Beermann, Nebraska Secretary of State, on July 3, 1992. On September 2, 1992, Mr. Beermann entered and order in which he refused to place the Clean Environment Act on the November general election ballot. The Clean Environment Act petitions contained 40,803 valid signatures, and 41,058 signatures were required to place an initiative proposal for a statute on the 1992 general elections ballot under the applicable provisions of the Nebraska Constitution. (*Id.* ¶ 8.)

20. Defendant Scott Moore was deposed, under oath, in *Bernbeck, et al. v. Scott Moore*, United States District Court for the District of Nebraska, Case No. 4:CV96-3263, on July 17, 1996. A true and correct copy of the cover page and pages 66 and 67 of that deposition, including questions posed to defendant Moore and his answers to those questions, is a part of the record. The parties stipulate that this deposition testimony may be considered as testimony of defendant Scott Moore in this action. (*Id.* ¶ 9.)

21. A lawsuit was filed at Docket 530, Page 222, in the District Court of Lancaster County, Nebraska, styled *State of Nebraska ex rel. Don Stenberg, Attorney General of Nebraska v. Scott Moore, Secretary of State of the State of Nebraska.* Trial in that case was held on March 11, 1996, and a true and correct copy of Judge McGinn's final order is a part of the record. Judge McGinn's decision in that case is currently on appeal in the Nebraska Supreme Court as Case No. S96-0697 (*Id.* ¶ 10.)[2]

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2. Essentially, the judge ruled that the constitutional amendment which inadvertently caused the problem in this case contained appropriate explanatory language under relevant Nebraska law.

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## II. LAW

At issue are questions of law concerning the constitutionality of the Nebraska Supreme Court's construction of sections of the Nebraska Constitution regarding the calculation of the number of signatures required in order to place an initiative on the ballot. A brief history of the relevant Nebraska constitutional provisions is helpful at this point.

### A. History on Number of Signatures Required

Prior to 1998, the number of signatures needed to place an initiative on the ballot in Nebraska was based on the number of votes in the last gubernatorial election. In 1988 Nebraskans amended their constitution to change the terminology in Article III, sections 2 and 3 from "electors" to "registered voters" when referring to the eligibility of an initiative and referendum petition signatory. See, Pt. I, ¶ 7. Article III, section 4 was unchanged by the 1988 amendment. *Id.*

The 1988 amendment resulted in an apparently unanticipated inconsistency in the Nebraska constitution regarding the base number to be used when calculating how many signatures were necessary. "Succinctly, article III, ¶ 2, provides that the number of signatures required is 10 percent of registered voters. Article III, ¶ 4, provides that the number of signatures would be based on the votes of the last gubernatorial election." *Duggan,* 245 Neb. at 912, 515 N.W.2d at 792. In 1994 the Nebraska Supreme Court was called upon to resolve the inconsistency created by the 1998 change in terminology.

In a unanimous decision the Nebraska Supreme Court held that the conflicting sections of the constitution could not be

reconciled and that the most recent amendment was controlling. Therefore, article III, section 2 as amended in 1988 effectively "repeal[ed] the reference in article III, section 4" which previously required the Secretary of State to ascertain the number of signatures required for an initiative measure to be placed on the ballot to be based upon the votes of the last gubernatorial election. *Id.* at 915, 515 N.W. 2d at 793. With this history in mind, I now turn to the plaintiff's claims in the present case.

B. Plaintiff's Claims

In their complaint the plaintiff's allege that because of the Nebraska Supreme Court's ruling in *Duggan*, they are unable to "know the number of signatures required to place an initiative on ballot until after the deadline for filing such petitions." (Filing 1 ¶ 9.) The plaintiffs assert that this lack of notice "violates freedom of a speech and procedural due process as guaranteed by the First and Fourteenth Amendments[s] to the U.S. Constitution." (*Id.*, ¶ 14.)

1. First Amendment Claim

The plaintiffs rely on *Meyer v. Grant*, 486 U.S. 414 (1988), to support their claim under the First Amendment. In that case the United States Supreme Court concluded that circulating an initiative petition involved core political speech and thus any restriction on that speech was subject to strict scrutiny under the First Amendment. The Court then struck down a Colorado statute making it a felony to pay circulators of initiative petitions. Plaintiffs' reliance on *Meyer v. Grant* is misplaced in this context.

That the plaintiffs cannot know the precise number of signatures they will need in order to have their initiative

measures placed on the ballot does not in any way restrict or inhibit their ability to circulate petitions or engage in core political speech. The statute in *Meyer v. Grant* that was invalidated was directly linked to the petition sponsor's speech and efforts to communicate with other voters about proposed legislation. Making it a felony to pay a petition circulator limited the number of voices and hours available for the petition sponsors to convey their message, and also limited the size of the audience that would ultimately be reached. *Id.* at 422-23. Those limitations in turn made it less likely that the petition drives would obtain the number of signatures necessary to place the measure on the ballot.

The plaintiffs in this case are not faced with any restrictions on how they may communicate their political message. This system may well make it difficult for the sponsors to plan their campaign and efficiently allocate their resources, but it does not limit the means the initiative sponsors may use in communicating their message or in any way limit the content of their message. *See Biddulph v. Mortham*, No. 95-3131, 1996 WL 400009, at *9 (11th Cir. Aug. 1, 1996) (per curiam) (*Meyer* and First Amendment scrutiny inapplicable to an initiative process that is merely "burdensome because it is unpredictable and imposes unnecessary costs on initiative sponsors."). For these reasons, the Nebraska Supreme Court's interpretation of the Nebraska Constitution, article III, section 2, does not violate Plaintiffs' First Amendment rights.

2. In the Due Process Claim

The plaintiffs' complaint also alleges that the manner in which the required number of signatures for an initiated measure is determined violates their rights to procedural due process. The possession of a protected life, liberty or property interest is

a condition precedent to the government's obligation to provide due process of law, and wher no such interest exists, there can be no due process violation. *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 718 (8th Cir. 1996). For the reasons discussed below I find and conclude that the plaintiffs do not have any such protected interest, and they are therefore not entitled to any procedural due process protections.

In their pretrial brief the plaintiffs contend that a "substantive liberty interest — the right to petition one's government" is violated by the method of determining the required number of signatures. (Pls.' Pretrial Br. at 4.) "The inability to have actual notice of the required number of signatures" prior to the date the signatures are due "is an interference or infringement of the exercise of this liberty interest." (Pls.' Reply to Def.'s Pretrial Br. at 4)

It is clear that the right to an initiative process is not a right guaranteed by the United States Constitution. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) (discussing *Meyer v. Grant*), 486 U.S. 414, 424 (1988)). It is also clear that once a state confers upon its citizens the right to an initiative, the state may not implement procedures to limit that state created right in contravention of the United States Constitution. *Id.* However, there is an important categorical difference between granting and defining the right to an initiative process in the state constitution and statutory procedures enacted to implement the right so defined by the state constitution.

The principal stated in *Meyer v. Grant* is that a state that adopts an initiative procedure violates the federal constitution if there are *procedures* implemented that unduly restrict the federal rights of the citizens who support the initiative. *Meyer*

*v. Grant*, however, does not prohibit Nebraska citizens from creating self-imposed constitutional limitations when defining the scope of the right they are creating.

In a case that involved a challenge to a statutory provision in Colorado restricting participation in the initiative process to registered voters of the state of Colorado, the district court for the District of Colorado found the source of that restriction did not derive from the statute being challenged, but it was a self-imposed restriction the voters of Colorado added their constitution. *American Constitutional Law Foundation, Inc. v. Meyer*, 870 F.Supp. 995, 1002 (D. Colo. 1994).

Because the source of the restriction derived from the Colorado constitution wherein the right itself is granted and defined, the federal court found that while it had authority to review other statutes that merely implemented the right the court did not have the authority to review the scope of the right as defined by the citizens of Colorado. The court stated:

> The people are the source of the power and they may exercise their sovereign authority to limit the scope of that power so long as there is no discriminatory classification. The Colorado electorate chose to restrict participation in the petitioning process to registered voters. This decision is not subject to any level of review by this court in the context of this case.

*Id.*

Such a conclusion is equally applicable here.

*Appendix B*

Unlike the statute challenged in *Meyer v. Grant* which limited the right given, the plaintiffs here challenge the very definition of the right conferred. The source of the right to initiate legislation is the Nebraska Constitution as is the requirement that 10 percent of all "registered voters" must sign an initiative petition before the measure may be placed on the ballot. Therefore, in *Duggan* the Nebraska Supreme Court was not called upon to interpret a regulation or statute that would limit the right to the initiative procedure, the court instead ascertained what the right itself meant and what the will of the people was in enacting the constitutional amendment in 1988.

What the plaintiffs are really disputing in this case is the Nebraska Supreme Court's interpretation of the Nebraska constitution. However, this court has no authority to second-guess the Nebraska Supreme Court's construction of its on constitution. Simply, but precisely, put "this decision is not subject to any level of review by this court in the context of this case." *American Constitutional Law Foundation, Inc. v. Meyer*, 870 F.Supp. at 1002. *See also Biddulph*, No. 95-3131, 1996 WL 400009, at *8 ("The rights [to place an initiative on the ballot] derive from wholly state-created procedures by which issues that might otherwise be considered by elected representatives may be put to the voting populace. The state, having created such a procedure, retains the authority to interpret its scope and availability."); *Reeves v. Hopkins*, 76 F.3d 1424, 1427 (8th Cir. 1996) (holding that the "Nebraska Supreme Court is the final arbiter of Nebraska law" and that "it is not the province federal courts to reexamine state determinations of state law questions."

In summary, the plaintiffs have no federal constitutional right to define the state constitutional right of the initiative

expressed in the document defining their own government and interpreted by their own high court. Therefore I conclude that the plaintiffs have failed to establish that they have been deprived of a constitutionally protected liberty interest which would entitle them to procedural due process protections.

Accordingly,

IT IS ORDERED that judgment shall be entered by separate document providing in substance that Plaintiffs shall take nothing against the Defendant and this case is dismissed.

DATED this 15th day of August, 1996.

BY THE COURT:

s/ Richard G. Kopf
RICHARD G. KOPF
United States District Judge